

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiff and Respondent,

v.

TONY HENDRIX,

Defendant and Appellant.

A155792

(Contra Costa County
Case No. 5-161458-5)

MEMORANDUM OPINION¹

Defendant argues that the trial court lacked jurisdiction to conduct a resentencing hearing while his petition for review was pending in our Supreme Court. Defendant further asserts that trial court improperly denied counsel's request that defendant be present for the resentencing hearing. The People concede that the court erred in both respects. We agree. We therefore vacate the sentence imposed during the resentencing hearing and remand for resentencing in accordance with this opinion.

PROCEDURAL BACKGROUND

After a jury trial, defendant Tony Hendrix was convicted of assault with a firearm on a peace officer (count 1) (Pen. Code, ² § 245, subd. (d)(1)) and exhibiting a firearm in

¹ We conclude this matter is proper for disposition by memorandum opinion in accordance with the California Standards of Judicial Administration, section 8.1. We therefore recite the facts only as necessary to resolve the issues on appeal.

the presence of a peace officer (count 3) (§ 417, subd. (c)). With respect to the charge of assault with a firearm on a peace officer, the jury also found true the allegation that defendant had personally used a firearm within the meaning of section 12022.53, subdivision (b).

In February 2017, the trial court sentenced appellant to state prison for a term of 14 years consisting of four years on the conviction for assault with a firearm on a peace officer, with an additional 10-year enhancement pursuant to section 12022.53(b). Pursuant to section 654, the court imposed but stayed a two-year sentence on the conviction for exhibiting a firearm in the presence of a peace officer.

Defendant filed a notice of appeal. In August 2018, another panel of this Division affirmed the convictions but remanded to the trial court for resentencing in light of the recent enactment of section 12022.53, subdivision (h). (*People v. Hendrix* (Aug. 3, 2018, A150770) [nonpub. opn.].) At the time of defendant's 2017 sentencing, the court had no discretion to strike the firearm enhancement. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 424.) Section 12022.53, subdivision (h), which became effective on January 1, 2018, now provides that "[t]he court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section." (§ 12022.53, subd. (h); *McDaniels*, at p. 424.)

Defendant filed a petition for review in the Supreme Court on September 5, 2018.³ The Supreme Court denied the petition on October 10, 2018, and the remittitur issued on October 18, 2018.

The trial court, however, conducted a resentencing hearing on September 28, 2018. At that hearing, the court first denied defense counsel's request to continue the

² All subsequent statutory references are to the Penal Code unless otherwise indicated.

³ We previously granted defendant's request that we take judicial notice of the Supreme Court's docket in *People v. Hendrix*, review denied October 10, 2018, S250507, as well as the docket on the earlier appeal to this court, *People v. Hendrix, supra*, A150770.

hearing so that defendant could be present. The court then declined to exercise its discretion to strike the firearm enhancement pursuant to section 12022.53, subdivision (h).

DISCUSSION

Defendant argues that the trial court lacked jurisdiction to resentence him while his case was pending in the Supreme Court. The People concede error, and we accept the concession. The parties are correct that the trial court was without jurisdiction to resentence defendant while his petition was pending in the Supreme Court and the remittitur had not yet issued. (*People v. Scarborough* (2015) 240 Cal.App.4th 916, 923; *People v. Alanis* (2008) 158 Cal.App.4th 1467, 1472–1473.)

Defendant further argues that the court erred in denying his counsel’s request that defendant be present at the resentencing hearing. The People agree that defendant was entitled to be present at the resentencing. We again accept this concession. (*People v. Rodriguez* (1988) 17 Cal.4th 253, 260 [because “permit[ing] the trial court to decide how to exercise its discretion under 26 U.S.C. § 1385 without affording defendant and his counsel an opportunity to address the subject would be manifestly unfair,” defendant’s presence was required on remand for resentencing hearing], superseded by statute on other grounds as stated by *People v. James* (2001) 91 Cal.App.4th 1147, 1149.) The defendant is entitled to be present when the court on remand considers whether to exercise its discretion to strike the firearm enhancement pursuant to section 12022.53, subdivision (h).

DISPOSITION

The sentence imposed on September 28, 2018 is vacated, and the matter is remanded to the trial court for resentencing in accordance with this opinion.

BROWN, J.

WE CONCUR:

POLLAK, P. J.

STREETER, J.

People v. Hendrix (A155792)